

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA

4 v.

12 Cr. 45 (RJS)

5 FAHD HUSSAIN,
6 JERMAINE DORE,
7 DWAYNE BARRETT,
8 TAIJAY TODD,
9 TAMESHWAR SINGH,

Defendants.

Conference

10 New York, N.Y.
11 October 24, 2012
12 3:30 p.m.

Before:

13 HON. RICHARD J. SULLIVAN

14 District Judge

15 APPEARANCES

16 PREET BHARARA

17 United States Attorney for the
18 Southern District of New York

19 MICHAEL D. MAIMIN
20 JESSICA A. MASELLA

Assistant United States Attorneys

21 RONALD L. GARNETT

22 Attorney for Defendant Hussein

23 ALICE L. FONTIER

24 Attorney for Defendant Dore

25 JAMES M. ROTH

1 Attorney for Defendant Barrett

2 STEVEN BRILL

3 Attorney for Defendant Todd

4 GEORGE VOMVOLAKIS

5 Attorney for Defendant Singh

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1 (Case called)

2 THE CLERK: For the government?

3 MR. MAIMIN: Michael Maimin and Jessica Masella for
4 the government. Good afternoon, your Honor.

5 THE COURT: Good afternoon.

6 For defendants, we will start with Mr. Hussain.

7 MR. GARNETT: Your Honor, I was informed by the
8 marshals at 3:30 that my client had refused to come to the
9 court today.

10 THE COURT: Yes, I have been advised of the same
11 thing.

12 MR. GARNETT: Ronald L. Garnett for Mr. Fahd Hussain.

13 THE COURT: Good afternoon to you, Mr. Garnett. We'll
14 talk about that in a moment.

15 For the next defendant, Mr. Jermaine Dore.

16 MS. FONTIER: Good afternoon, your Honor. Alice
17 Fontier on behalf of Mr. Dore, who is also in custody but not
18 present today.

19 THE COURT: The word that I have is that he refused to
20 leave his cell to come to today's court appearance.

21 MS. FONTIER: I was informed of the same by the
22 marshals, your Honor.

23 THE COURT: Good afternoon to you, Ms. Fontier.

24 Next, Dwayne Barrett.

25 MR. ROTH: Mr. Barrett is here with me, James Roth.

1 THE COURT: Mr. Roth, good to see you. Mr. Barrett.
2 Good afternoon. Mr. Roth, you have shaved your mustache. It
3 was a long time you had that mustache. You look very handsome.

4 MR. ROTH: Thank you.

5 THE COURT: Next we have Mr. Todd.

6 MR. BRILL: Judge, good afternoon. Sullivan & Brill
7 by Steven Brill for Mr. Todd.

8 THE COURT: Mr. Todd, good afternoon to you.

9 DEFENDANT TODD: Good afternoon.

10 THE COURT: Finally, we have Mr. Singh.

11 MR. VOMVOLAKIS: George Vomvolakis for Mr. Singh. Mr.
12 Singh is here seated to my left.

13 THE COURT: Mr. Vomvolakis and Mr. Singh, good
14 afternoon.

15 DEFENDANT SINGH: Good afternoon, your Honor.

16 THE COURT: We are here in connection with defense
17 motions. Two motions have been made, motions by Mr. Dore and
18 Mr. Singh. The nonpresence of Mr. Hussain I don't think poses
19 much of a problem, since he didn't have a motion anyway. He
20 should be here.

21 Next time if this happens I guess I will issue a force
22 order that requires the marshals to put on all that gear and go
23 out and bring somebody here. People have to be here. You
24 can't just not show up. Hopefully it doesn't get to that
25 point. I don't think the nonpresence of Mr. Hussain should

1 prevent us from doing anything.

2 I'm not sure that the nonpresence of Mr. Dore poses
3 any more of a problem. It's his motion, but we are here to
4 resolve a purely legal issue. I think the statute or the rule,
5 Rule 43 of the Federal Rules of Criminal Procedure, doesn't
6 require a defendant to be present where the conference or
7 hearing is on a legal question. The motions here are legal in
8 nature. That is my view. It is certainly my intention to go
9 forward with those motions and to rule on them today.

10 Do you have a different view, Ms. Fontier?

11 MS. FONTIER: Not entirely, your Honor. The reason I
12 didn't file a reply is because I tried to find a way around the
13 standing issue. The question of whether Mr. Dore would file an
14 affidavit or not is not entirely a question of law and one that
15 I am not necessarily comfortable saying, without him here, that
16 he absolutely does not want to do that.

17 THE COURT: The time to file motions has come and
18 gone. I set a schedule. I don't think that a defendant, or
19 anybody, is free to just sort of say now I'm going to decide to
20 engage. We'll talk about that motion more, but I think we are
21 under law fine with proceeding. Does the government have a
22 different view?

23 MR. MAIMIN: Your Honor, we do not believe that there
24 are any factual disputes, at least certainly with respect to
25 Mr. Dore's motion. Should any arise during argument that leads

1 to some sort of factual issue, at that point we can reevaluate
2 whether we should proceed.

3 I agree with your Honor. I understand Ms. Fontier's
4 statement that if she wants to seek leave to file in the
5 future, she doesn't want to make that request now. But that is
6 a request that she could make in the future and, as your Honor
7 pointed out, of course, it is entirely within the Court's
8 discretion whether to grant such leave or to hold the parties
9 to the motion schedule previously established.

10 THE COURT: Rule 43 says that there are certain
11 instances where a defendant's presence is required. Those
12 include the initial appearance, the initial arraignment, and
13 the plea, every trial stage, including jury impanelment and the
14 return of the verdict. I'm not sure that a pretrial conference
15 counts as a trial stage. And then sentencing. Arguably, it is
16 not required under 43(a).

17 If this is considered trial stage, there nevertheless
18 is an exception recognized for waiver. "A defendant who was
19 initially present at trial waives the right to be present under
20 the following circumstances: When the defendant is voluntarily
21 absent after the trial has begun."

22 If we are considering pretrial conferences a stage of
23 trial and the defendants have declined to come out of their
24 jail cells, I think that would constitute a waiver. But I
25 don't think we even need to get there, frankly.

1 MR. MAIMIN: Just to add for the record, I believe
2 there is another carve-out in Rule 43 that a defendant's
3 presence is not required for conferences or matters where only
4 legal issues will be decided.

5 THE COURT: That one I have already relied on. That
6 applies here regardless. I think we are fine with proceeding.
7 I don't want to beat this to death. The defendants who are
8 here, thank you, for taking this seriously. I wouldn't think I
9 would have to tell you that. I try to treat you all
10 courteously and I appreciate it when you do the same for me.

11 Defendants who don't show up or who persistently
12 require the Court to deal with things like this, if we ever get
13 to a point where there is a sentencing, I think these are
14 relevant factors to consider. This is neither here nor there
15 now. Each of the defendants is presumed innocent and we are
16 going to proceed to trial in December.

17 Let's deal with the motions. The first motion is a
18 motion from Mr. Dore to suppress the historical cell site
19 evidence that was collected in the case. Ms. Fontier, I
20 reviewed your brief, the government response. Is there
21 anything else you would like to say? I'm happy to hear from
22 you if you would like.

23 MS. FONTIER: No, your Honor. Again, I do think that
24 the standing issue is a legitimate concern. An affidavit was
25 not filed. But I do stand by the legal background of it, and I

1 do believe that in this case, because of the scope of the cell
2 site evidence that was obtained well over a year, that it goes
3 into the search and they should have had probable cause for
4 this, which they did not.

5 I also would note that the affidavit that was filed,
6 even under the Stored Communications Act, the SCA, is to my
7 mind wholly deficient. It is a conclusion. They essentially
8 say there are crimes, there were phones, we want to have this
9 information, it will help us. There is nothing else outside of
10 that to tie Mr. Dore to any of these offenses.

11 I don't think it even meets the specific and
12 articulable facts. I do stand by that. I would hope that your
13 Honor would actually decide those issues outside of the
14 standing question.

15 THE COURT: Thank you.

16 Any response from the government?

17 MR. MAIMIN: Very briefly, your Honor. In light of
18 the apparent concession on the standing issue, I don't think
19 that it is necessary to go into anything else, which would
20 fundamentally be academic in the circumstances.

21 THE COURT: I am an academic. I teach.

22 MR. MAIMIN: That's true, as do I, although my
23 students may disagree as to whether I'm an academic. In light
24 of that, unless your Honor would like further discussion of
25 other things, I think it is so rapidly dealt with by the

1 standing issue that there is no need to take further time with
2 the Court.

3 THE COURT: I'm prepared to rule. I think the first
4 issue is the standing issue. The defendant has the burden of
5 establishing standing. That burden is met only by submitting
6 an affidavit either from the defendant or someone else with
7 personal knowledge. That is the case law, and this is quite
8 clear from the circuit and throughout the district. United
9 States v. Watson, 404 F.3d 163 is but one example.

10 The defendant cannot simply rely on the government's
11 arguments or expected proof to establish that he owned or used
12 the phones. Here Mr. Dore has not submitted an affidavit
13 averring that the phones at issue were his or that he had a
14 subjective expectation of privacy in the historical cell site
15 evidence related to those phones.

16 Two of those phones have no subscriber information.
17 The third has a different subscriber information, which appears
18 to be false, which would appear to weigh against any subjective
19 expectation of privacy. The absence of any affidavit to the
20 contrary, I am prepared to find that there is a lack of
21 standing and the motion should be therefore denied.

22 The constitutional arguments I think are interesting
23 ones. The argument is that the act is unconstitutional as
24 applied in this case. I am, frankly, persuaded by the
25 reasoning of the district court in the District of Maryland in

1 the case of United States v. Graham, 846 F.Supp.2d 384, which I
2 think comes out a little differently than some of the Eastern
3 District cases.

4 I think the arguments relied on by Dore are really
5 focused not on the law as it currently stands but really on
6 arguments that are perhaps evolving as a result of concurrence
7 in the United States v. Jones, which was decided last term.
8 But I don't think the Supreme Court has gotten there yet. The
9 Supreme Court in Jones certainly did not adopt the mosaic
10 theory upon which the D.C. Circuit relies in the lower case,
11 United States v. Maynard.

12 Even assuming that that mosaic theory is a valid
13 theory, I don't think it applies to historical cell site
14 information. I think there is a real distinction to be made
15 between GPS monitoring, which is what was at issue in the D.C.
16 Circuit case, and historical cell site information. One is, I
17 think, far more intrusive than the other. I think expanding
18 the mosaic theory to include cell site information of the sort
19 that is at issue here would be overly broad, I don't think it
20 is justified, and I'm certainly not prepared to do it.

21 In addition, the issue of third-party disclosure I
22 think also eliminates any reasonable expectation of privacy.
23 This is a situation where these are cell site records that are
24 voluntarily disclosed to the phone company. A customer has no
25 reasonable expectation of privacy in business records held by a

1 third party. That is the Supreme Court in Smith v. Maryland,
2 442 U.S. 735.

3 Here the government obtained the cell site data from a
4 third-party provider, very different than the Jones case that
5 was decided last term in the Supreme Court, where the
6 government affixed the GPS device on the vehicle, in essence
7 trespassing. That is what Justice Scalia went off on, the fact
8 that there was a physical trespass, a physical intrusion.
9 There was no physical intrusion here. The government simply
10 asked T-Mobile to produce the business records, and that's what
11 ended up happening.

12 With respect to the length of time that was at issue
13 here, Ms. Fontier mentions that it was over a year that the
14 cell site orders were in effect. I guess it was November 2010
15 to January 2012, 438 days I think. The government argues that
16 the results with respect to the Dore phones were more limited
17 and covered a period of only 86 days. I think there is
18 something to be said for that argument. United States v. Caro,
19 468 U.S. 705, 712, the Supreme Court back in the '80s focused
20 on the actual as opposed to the potential invasions of privacy
21 for Fourth Amendment purposes. So I think I'd be inclined to
22 agree with that.

23 In any event, I think the good faith exception to the
24 warrant requirement would apply. The weight of judicial
25 authority holds that section 2703(d) may be used to compel cell

1 site records possessed by a third-party provider without
2 intruding on the Fourth Amendment.

3 Another issue raised was with respect to whether the
4 historical cell site evidence was sufficient to satisfy the
5 specific and articulable facts test under the Stored
6 Communications Act, whether the affidavit was. I think it is
7 worth noting that the exclusionary rule does not apply to
8 alleged violations of section 2703(d).

9 Section 2708 says, "The remedies and sanctions
10 described in this chapter are the only judicial remedies and
11 sanctions for nonconstitutional violations of this chapter."
12 Then, the Stored Communications Act offers remedies and
13 sanctions of the following sort: Criminal sanctions, civil
14 causes of action, and administrative discipline. It does not
15 provide for suppression as a remedy. I think that alone would
16 make suppression improper. Either way, I think the specific
17 and articulable fact standard is certainly less than probable
18 cause, though other judges I guess have argued otherwise,
19 perhaps in dicta.

20 In any event, the motion is denied. I think standing
21 alone is a basis to get there. Even if Mr. Dore had submitted
22 an affidavit, I think it would still be a loser. Although,
23 given I think Justice Sotomayor's concurrence in Jones, who
24 knows what could happen in a couple of years, Ms. Fontier. So
25 I commend the effort.

1 MR. ROTH: Judge, for the record, I along with others
2 and Ms. Fontier indicated joining in the motion to the extent
3 that it was applicable.

4 THE COURT: Yes. I wasn't clear how it was
5 applicable. You didn't submit an affidavit either, right?

6 MR. ROTH: I think you found implicitly that Barrett
7 had standing with respect to his phone, which subsequently
8 historically cell site information was tracked from her phone
9 to his phone and vice versa. I think you held that he had
10 standing that the phone was taken from him on the day that he
11 was brought into the precinct, not taken from him but from the
12 car, in your ruling.

13 THE COURT: Has he submitted an affidavit indicating
14 that is his phone, that he has a private ownership interest an
15 expectation of privacy in the phone? Am I missing something?

16 MR. ROTH: No. That was the phone that your Honor
17 ruled he gave to consent to, and I thought implicit in that
18 ruling -- he did do an affidavit in conjunction with the
19 earlier suppression hearing when he said there was a phone
20 taken from the Mercedes that he was driving.

21 THE COURT: I guess the second half of my ruling
22 covers Mr. Barrett.

23 MR. ROTH: Yes, I understand.

24 THE COURT: Maybe I didn't connect the dots. Did you
25 connect the dots, Mr. Maimin?

1 MR. MAIMIN: I'm afraid that I did not connect the
2 dots, and I haven't looked at that affidavit. I think in
3 addition it would have to say not only was it his phone but
4 also aver a subjective interest in the data stored by T-Mobile
5 or whichever phone company that phone was attached to. But I
6 think again, to beat on a word, it's academic in light of the
7 second part of your Honor's ruling.

8 THE COURT: I think you agree with that.

9 MR. ROTH: Yes.

10 THE COURT: The second part.

11 The next motion is Mr. Singh's motion. Mr. Singh has
12 requested severance. He is concerned about prejudicial
13 spillover, spillover that would be sufficiently severe to
14 outweigh the judicial economy that would be realized by trying
15 the co-conspirators together. Mr. Vomvolakis, I'm happy to
16 hear from you if there is anything you would like to say beyond
17 what is in your papers.

18 MR. VOMVOLAKIS: No, Judge. We are going to rely on
19 our submission.

20 THE COURT: Does the government have anything they
21 would like to add?

22 MS. MASELLA: Nothing to add, your Honor, unless the
23 Court has any questions.

24 THE COURT: I think it is fairly straightforward.
25 Motions of this sort get made frequently, and I can understand

1 why they get made. But it is a high standard. Mr. Singh is
2 charged with acting with all the other defendants in a single
3 conspiracy, a single robbery conspiracy count, as well as
4 related violations of 924(c) gun counts related to the robbery
5 conspiracy.

6 I think the law is very clear that evidence of a
7 larger conspiracy in which Mr. Singh participated would not
8 constitute prejudicial spillover. It's one conspiracy. The
9 case frequently cited for that proposition is a Second Circuit
10 case, United States v. Rosa, 11 F.3d 315, 341.

11 Mr. Singh relies on an insider trading case, United
12 States v. McDermott, where the Second Circuit reversed the
13 conviction of a defendant for conspiracy to commit insider
14 trading because there was "no record evidence suggesting that
15 McDermott's agreement with the tippee encompassed a broader
16 scope than the two of them." That's McDermott, 245 F.3d 133,
17 138. I think the cases are readily distinguishable.

18 Here there is I think clearly sufficient evidence to
19 demonstrate the existence of a conspiracy. McDermott basically
20 changed or altered the then-existing law with respect to an
21 insider trading conspiracy. But here we have a very different
22 conspiracy alleged. It's a robbery conspiracy that is set
23 forth, existed over a period of time with multiple members who
24 engaged in multiple robberies. I think it is a readily
25 distinguishable case.

1 To prove a single conspiracy, the government needs
2 only to show that the defendants agreed to participate in what
3 they knew to be a collective venture toward a common goal.
4 That's United States v. Washington, 48 F.3d 78, 80.

5 That agreement may be tacit rather than explicit, and
6 the government need not show that a particular defendant was
7 aware of all the contours of the conspiracy or all of the other
8 co-conspirators so long as they agreed on the essential nature
9 of the plan. That's United States v. Maldonado Rivera, 922
10 F.3d 934, 963, all Second Circuit cases.

11 Where there is sufficient evidence to show the
12 existence of a conspiracy, the government is entitled to show
13 the entire range of evidence of the conspiracy against each
14 defendant. That's a quote from United States v. Nersesian, 824
15 F.2d 1294, 1304.

16 A single conspiracy is not transformed into multiple
17 conspiracies merely by virtue of the fact that it may involve
18 two or more phases or spheres of operation so long as there is
19 sufficient proof of mutual dependence and assistance.

20 Here Mr. Singh is alleged to have participated in
21 carrying out at least one of the robberies described as an
22 overt act in Count One, is alleged to have been involved in the
23 planning, surveillance, and gathering of information in
24 connection with the robberies carried out by the robbery crew.
25 It seems to me that that is sufficient to make it appropriate

1 for all the defendants to be tried together.

2 I don't think Mr. Singh would be unduly prejudiced by
3 a joint trial in which the other conspirators were involved in
4 further crimes. The law is clear that differing levels of
5 culpability and proof are inevitable. It is not unusual in a
6 multidefendant trial. And standing alone, that is not a
7 sufficient basis for a separate trial.

8 In addition, judicial efficiency, which is something
9 the Court should weigh, I think in this case weighs strongly in
10 favor of trying the defendants together. Multiple trials would
11 involve significant duplication of efforts, would burden the
12 Court, would burden the parties. In a court system that is
13 stretched to the limit, that would be inappropriate. I think
14 the burden on victim witnesses would also be severe. This is a
15 Hobbs Act robbery conspiracy, so victims would have to testify
16 multiple times.

17 I also think that a limiting instruction would be
18 sufficient to cure any problems with respect to acts that were
19 engaged in by some co-conspirators but not by Mr. Singh. I'll
20 certainly entertain if there is an appropriate limiting
21 instruction during the trial or before the trial.

22 I don't think the posed argument that Mr. Singh has an
23 interest in a speedy trial that compels his severance is
24 appropriate where we have trial scheduled for December. I
25 think we are barely a month away.

1 So I am going to deny the motion respectfully with
2 respect to Mr. Singh's request for a severance.

3 That handles the pretrial motions. Well, the ones I
4 have. I still may be getting motions or submissions with
5 respect to Mr. Todd's motions. I have already set a separate
6 schedule for that.

7 MR. BRILL: That's right.

8 THE COURT: Is there anything else we should be
9 covering today?

10 MR. MAIMIN: Just so we and defense counsel know, with
11 respect to Mr. Todd's motions, assuming there are submissions
12 and those go forward, will your Honor want all defendants here
13 or just Mr. Todd for oral argument?

14 THE COURT: I think just Mr. Todd. I scheduled this
15 conference with everybody because it had been a while since we
16 had all been together and I don't like it to go long. I wanted
17 to make sure everybody was here, recognizing perhaps that some
18 defendants would not be making motions. With respect to Mr.
19 Todd's motion, though, I think there is no need to pull
20 everybody back. Anyone who wants to come would be welcome to
21 come. We haven't scheduled that.

22 MR. MAIMIN: I want to say that's November 7th.

23 THE COURT: I think that's right. If there is going
24 to be a hearing, we may need to tweak that, right?

25 MR. MAIMIN: That's right. Although right now our

1 intent, if those motions go forward, we think that it is likely
2 that we would concede to a hearing on one of the issues and
3 object to a hearing on another issue, which would limit the
4 length of the hearing.

5 THE COURT: I scheduled it for 4:30 on a Wednesday.
6 We have to decide. I'm going to need guidance from you folks
7 on this, whether an hour, an hour and 15 minutes tops is going
8 to be enough time to hold a hearing on the disputed issue.

9 MR. MAIMIN: We will put into our papers how many
10 witnesses we expect.

11 THE COURT: Mr. Brill, focus on that as well. I'm not
12 sure if you're planning to call witnesses, but you have a sense
13 that you will want to cross some of these folks and you may
14 want to call some of your own people.

15 MR. BRILL: Yes. When we were discussing the date and
16 your Honor was gracious enough to grant me some time, we did
17 take into consideration that the witnesses would appear.
18 Frankly, I thought it was 3:30 and that we would have time.

19 THE COURT: I have a trial going that week.

20 MR. BRILL: All right. Whenever the Court is able,
21 I'm prepared to engage in that hearing. I did let the
22 government know that there is at least one witness that I
23 intend to call. They are aware of her. In fact, she submitted
24 an affirmation to the original motions.

25 THE COURT: I haven't looked at the submission since

1 we last met. Am I still awaiting a reply?

2 MR. BRILL: I don't think so. I just want to make
3 clear. The government has said if the submissions go forward.
4 Just so I'm clear, I'm only a week into this, but my
5 understanding is that Ms. Bank did indeed file pretrial motions
6 with respect to the suppression of a cell phone that was
7 allegedly found in Mr. Todd's home and in addition post-arrest
8 statements that occurred subsequent to the arrest. My feeling,
9 and I've told this to the government, is that I stand by those
10 motions and I'm prepared to move forward with the submissions.

11 THE COURT: You haven't responded yet, right?

12 MR. MAIMIN: We have not responded yet. As part of
13 the adjournment, your Honor adjourned the submission schedule.
14 The only reason I'm saying that is because Mr. Brill was new to
15 the case. I never want to presume what he is going to decide
16 to do.

17 THE COURT: Thank you.

18 MR. BRILL: I appreciate that.

19 THE COURT: Your response and your reply. Tell me
20 what you think we're going to need in terms of the hearing. I
21 think 4:30 might be cutting it pretty close. If we need to
22 find another day with a larger block of time, we'll have to try
23 to do that.

24 MR. BRILL: That may make sense.

25 THE COURT: I'll wait to see what I get from you and

1 then we will be in touch. None of the other defendants have to
2 come, but you're welcome to come. If you want to watch that
3 motion, that's fine with me.

4 MR. ROTH: My client has already accepted that
5 invitation to come, your Honor.

6 THE COURT: Mr. Barrett, if you want to be there,
7 that's fine. It's scheduled now for November 7th at 4:30. If
8 that changes, we'll let Mr. Roth know and he'll let you know.
9 Nobody else has to decide today, but you are welcome to come.
10 Just let the government know, because the government will have
11 to put in a slip.

12 Anything else you wish cover today? Mr. Garnett?

13 MR. GARNETT: Yes, your Honor. It is with deep regret
14 that I bring this to the Court's attention. It is a completely
15 failure on my part and an inconvenience, would be an
16 inconvenience to the Court and all parties. I was well aware
17 of our trial date of December 3rd. Through inadvertence
18 totally and exclusively my own responsibility -- a murder-for-
19 hire trial with five defendants before Judge Marrero was
20 originally scheduled for June. Through my own inadvertence, it
21 was changed by an order of the court. Draft by the government,
22 by the way, but endorsed by Judge Marrero. The trial was
23 adjourned to November 26th. It was adjourned for several
24 months because of a pregnancy of one assistant and then a death
25 in the other assistant's family, mother, I believe.

1 I didn't pick up that order until I was told last week
2 that the case was on for November 26th. I immediately went to
3 ECF. It wasn't a specific order filed. It was a letter that
4 was endorsed by Judge Marrero adjourning the case.
5 Unfortunately, no communication occurred between myself and
6 other parties to the case. I was totally unaware of it until a
7 few days ago.

8 This trial, the murder for hire trial, is expected to
9 go at least three weeks, maybe four. I discussed it with Ms.
10 Fontier. She has reaffirmed her trial in San Diego in January
11 but suggested that it this trial might be held in the beginning
12 of the month before she has to leave.

13 THE COURT: Beginning of January?

14 MR. GARNETT: In January. I did not have a chance to
15 discuss with other counsel what their schedules are, and I
16 assume that we all have schedules. But this particular one is
17 totally and exclusively my own failure to do so. I regret that
18 very deeply. I'm not certain that that is sufficient to
19 overcome the problem.

20 THE COURT: I'm not sure that it is going to be
21 possible to get everybody else on board with a date. I will
22 tell you I have Part I duty in January. If everybody wanted to
23 move to early January, I could see about switching my duty.
24 Otherwise, I can't do Part I and a trial. I would have to move
25 something.

1 I'm reluctant to move it given what we have talked
2 about. If everybody else is amenable and available for the
3 first two weeks of January, I guess that's an option. You
4 don't have to decide today. Why don't you talk it over. I
5 don't think there is much point in doing this now.

6 MR. GARNETT: The other option I was prepared to make,
7 given that Mr. Hussain is not involved in any of the pretrial
8 motions and has no standing on the issues which have been
9 raised, should your Honor wish that I resign from that
10 representation because of this conflict, another attorney would
11 have sufficient time I believe in a month to prepare.

12 THE COURT: I don't know if a month would do it.

13 Do you want to say something, Mr. Maimin?

14 MR. MAIMIN: Yes, two things. One is Ms. Masella and
15 I were talking to Mr. Garnett about this. We remembered that
16 we had heard something from one of the attorneys on the Judge
17 Marrero trial about the trial possibly being adjourned. We
18 were thinking of when it was adjourned to November 26th, if
19 there was discussion among some of the defense counsel about
20 adjourning it again. First of all, this may end up playing
21 itself out, and we would ask to have time to go to speak to
22 them and find out.

23 THE COURT: Why don't you guys all talk. I know Mr.
24 Singh in particular has been anxious to get this show on the
25 road. I don't blame him. I'm anxious to do the same. A month

1 probably wouldn't kill anybody, but at the same time I'm
2 sensitive to that request.

3 I don't know about the other lawyers, whether that
4 might not even be possible for them. Why don't you folks all
5 talk it over and see what you come up with. If we need to talk
6 further, send me a letter, and we can either get on the phone
7 or I can bring you back.

8 MR. MAIMIN: Certainly. Were we to go in January, I
9 think your Honor would lose me. As your Honor is aware, I have
10 a six-to-eight-week trial starting the first week of February.
11 I think that would probably cut it too close.

12 THE COURT: This is going to be a two-week trial?

13 MR. MAIMIN: That's right, your Honor. I certainly
14 would like some time to prep for that trial.

15 THE COURT: This may be academic anyway. We would
16 start January 7th. That's the first Monday in January. It
17 might be cutting it too close for you. Confer with each other
18 and let me know if there is a consensus or not. Anybody who
19 wants to be heard on this can send me a letter. I won't make
20 you do a joint letter. Send me a letter making a request.

21 MR. ROTH: Judge, the only other thing is we still
22 have in abeyance the issue of no death or death.

23 THE COURT: Yes. What is going on with that?
24 Excellent point. Thank you.

25 MS. MASELLA: Your Honor, I was checking in this week

1 with the folks in Washington. They have informed me that the
2 case has moved out of the capital case unit, which is the first
3 step that ordinarily takes the longest amount of time. It's
4 been fully signed off on and moved out of that unit. It is now
5 in the Deputy Attorney General and Attorney General's office
6 awaiting signatures.

7 Their best estimate is that we will definitely have an
8 answer by the middle of November, although it is my
9 understanding that that is the most conservative estimate, and
10 it could come any time between now and the middle of November.

11 THE COURT: The defendants who are in the death-
12 eligible counts are who?

13 MS. MASELLA: Mr. Dore and Mr. Barrett.

14 THE COURT: It's highly unlikely that there is going
15 to be a directive from the Attorney General that you should be
16 seeking the death penalty. But if that were the case, then I
17 likely would be severing the nondeath-eligible defendants.
18 Right?

19 MS. MASELLA: We certainly would have that discussion.
20 It would at the very minimum affect the timing because there
21 are a whole slew of other motions that become relevant.

22 THE COURT: That would be the reason for the
23 severance.

24 MS. MASELLA: Correct.

25 THE COURT: Anybody who is a nondeath-eligible

1 defendant, there is no reason why they should be waiting for
2 that process to get resolved. In any event, again, it might
3 not be more than a hypothetical at this point. You don't think
4 there will be a final world until the middle of November?

5 MS. MASELLA: They told us mid November. It is my
6 understanding that that is the outside and that it will likely
7 come earlier. I will, of course, inform the Court and counsel
8 the minute that we hear anything. I will also periodically
9 check on the status and let the Court and counsel know if there
10 is any change to the estimated timing.

11 THE COURT: I don't know what to do to sort of light a
12 fire under the Attorney General or the Deputy Attorney General.
13 There are individual lives and lawyers' lives and court dockets
14 and schedule calendars that are going to require them to
15 decide. I think they have to get out of the Washington mindset
16 and start deciding things.

17 MS. MASELLA: I agree, your Honor.

18 THE COURT: If you can stress that. I'm not sure what
19 I can order anybody, but I'm going to start thinking about what
20 I can do, because this wreaks havoc on the ability to maintain
21 a docket. I have a lot of other cases that will be affected by
22 this decision, not to mention the defendants themselves being
23 highly affected by this decision.

24 We have to be quicker. What is the point of having a
25 speedy trial right if the government can just sort of decide to

1 take the slow train on whether or not they are going to seek
2 certain penalties? That's end of speech at this point.

3 Anything else we should cover today? Let me thank the
4 marshals and thank the court reporter as well. Have a good
5 day. If anyone wants a transcript, you can get that. I will
6 approve that on an expedited fashion just because it is
7 probably good to get this moving.

8 Ms. Fontier, Mr. Garnett, tell your clients that they
9 have got to show up.

10 (Adjourned)

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